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NOS. 342 and 343

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

UNITED STATES, *Petitioner,*

v.

SWISS CONFEDERATION.

UNITED STATES, *Petitioner,*

v.

SOCIETY OF CHEMICAL INDUSTRY, BASLE, SWITZERLAND,
A JOINT STOCK COMPANY.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION.

This brief is submitted jointly by the Swiss Confederation, respondent in No. 342, and Society of Chemical Industry, Basle, Switzerland, respondent in No. 343, in opposition to the petition of the United States for writs of certiorari to review judgments of the Court of Claims.

ARGUMENT.

The Swiss Government Can Maintain this Suit in the Court of Claims.

While respondent feels that, *generally*, there is no prohibition against a foreign government maintaining a suit in the Court of Claims, that *broader* question need not be decided in this instance. The more narrow and simple question is involved here, namely, whether Congress, under the requisition statute here involved, has given its consent that *every owner* of requisitioned property may bring suit for its value against the United States in the Court of Claims. The answer, it is submitted, is in the affirmative upon the authority of *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 75 L. Ed. 473.

In the *Russian Volunteer Fleet* case, the plaintiff, a Russian corporation, was the assignee of certain contracts for the construction of two vessels by a shipbuilding company. Pursuant to the Act of June 15, 1917 (Chap. 29, 40 Stat. at L. 183), an agency of the United States requisitioned these contracts and the vessels being constructed thereunder. The requisitioning Act contained a provision substantially the same as the one under which the seizure was made in the case at bar. At that time, the Russian Government was not recognized by the Government of the United States. It was held that since the plaintiff was given a cause of action under the Act of June 15, 1917, the limitation in Section 261 of 28 U. S. C. should be ignored. This Court pointed out that the case of an alien friend is not excepted from the provisions of Section 250 of Title 28 U. S. C.; and the Court said (p. 491 of 282 U. S.):

> "The Act of June 15, 1917, makes no reference to Section 155 of the Judicial Code, U. S. C. title 28, Section 261, with respect to alien suitors, and the question is whether that provision should be implied as establishing a condition precedent and the recovery thus be defeated. It is at once apparent that such an implication would lead to anomalous results. It would mean that, although the United States had actually taken

possession of the property and was enjoying the advantages of its use, and the alien owner was unquestionably entitled to compensation at the time of the taking, it was the intention of the Congress that recovery should be denied, or at least be indefinitely postponed until the Congress made some other provision for the determination of the amount payable, if it appeared that citizens of the United States were not entitled to prosecute claims against the government of the alien's country in its courts, or that the United States did not recognize the regime which was functioning in that country."

It is clear that the principle of the *Russian Fleet* decision is equally applicable to the case at bar. In that case, this Court held that the *express* statutory limitation of Section 261 would not bar a plaintiff, disqualified thereunder, from recourse to the Court of Claims provided for under the applicable requisitioning statute. In the instant case, the *implied* disqualification of the plaintiff, urged by the petitioner, would, even if true, likewise be no bar to its rights under the Act of October 10, 1940.

The petitioner undertakes, unconvincingly we think, to distinguish the *Russian Fleet* case.

Firstly, it is claimed that the phrase in the statute reading "in the manner provided by sections 41 (20) and 250, Title 28, of the Code of Laws of the United States of America," limits the Court of Claims to whatever its jurisdiction was prior to the enactment of the statute. There are two obvious answers to this argument. One is that there is nothing in Section 250 of Title 28 that ever prohibited the Court of Claims from taking jurisdiction of a suit by a foreign sovereign;[1] and the other and more simple answer

[1] *George V., King of the United Kingdom, etc.*, v. *United States*, 60 C. Cls. 1027, is by no means a clear-cut decision, and although called to the attention of the Court of Claims, was not taken sufficiently seriously even to cause comment upon it in its opinion. *Berger* v. *United States*, 36 C. Cls. 243, was correctly distinguished by the court below in its opinion. (Swiss R. 11.)

is that the phrase "in the manner provided by" merely means "in the Court of Claims."

Secondly, it is argued by the petitioner that, in the *Russian Fleet* case, the claimant was a private corporation, and that this Court expressly distinguished, at page 492 of 282 U. S., that situation from one where the claimant might be a foreign sovereign. However, an examination of the entire context, out of which is taken the quotation relied upon by the petitioner, quickly discloses that this Court did not have in mind any distinction between an *owner* which was a private foreign corporation and one which was a foreign nation, but simply made the quoted statement in relation to the *diplomatic* matter of *recognition* of a foreign government or regime.

The difficulties envisaged by the petitioner on pages 13 and 14 of its Petition are, we respectfully submit, not open for consideration by this Court. Congress has elected to permit *every* dissatisfied owner to file suit under the statute here involved, and it is immaterial whether or not consequences occur as anticipated by petitioner.

The zeal of lawyers has dimmed their perspective for practicalities in this instance, as frequently happens. What difference does it make that the owner is a foreign nation? Congress has promised it fair and just compensation for its requisitioned property. The American courts have adequate machinery to determine this, whoever the owner may be; that is to say, the processes for determining this question are the same in the Court of Claims whether or not the claimant be a foreign nation; and if the foreign nation is willing to come into the American courts, why should the United States Government complain?

In the case of foreign individuals who are claimants, Congress has announced in Section 155 of the Judicial Code (28 U. S. C. 261) a policy of reciprocity. Let it be assumed that this policy should be stretched to include foreign nations. Respondent has established by evidence in this

case (Swiss R. 42-44) that the Swiss courts would be open to petitioner if the factual situation were reversed.

There is clearly no merit to petitioner's argument upon this point.

The Court of Claims Correctly Based Just Compensation Upon Export Prices, and Properly Ignored the British Purchases.

Respondents have combined under the above heading answers to petitioner's second and third points, namely, that the *export* market value and not the *domestic* value should govern here; and that the prices paid by the British Purchasing Commission for toluol should have no bearing upon the case. Moreover, we do not feel that the lower court's decision does violence to *United States* v. *New River Collieries*, 262 U. S. 341.

First, let us dispose of the so-called British sales. Respondents submit that these sales involved a special price, and were not reflective of the true export market price.

The testimony of Mr. Groebe of the Barrett Company shows beyond any peradventure that the sales and prices to the British were very special ones under the circumstances, and that all other foreign exporters were confronted both with difficulties of acquisition of toluol as well as higher prices.

For example, see pages 36-37 of the Swiss Record where Mr. Groebe testified as follows:

> "163 XQ. Isn't it fair to say that because our sentiments were with the British, your principals and yourselves made a special price to the British to get them this toluol?
>
> "A. In so far as Barrett is concerned I would say 'yes'. I don't know what our principals' sentiments were, but we can assume they were the same."

Testifying at the time specifically about sales in 1940, Mr. Groebe was asked and replied, respectively, as follows (Swiss R. 39):

"186 XQ. And you have already said that the price to the British, by virtue of sympathy and related emotions, was a special price?

"A. I wouldn't say it was a special price; it was a lower price.

"187 XQ. It was a lower price. As a matter of arithmetic it was a lower price, but it was a lower price because of special consideration.

"A. Yes."

See, also, the testimony of Mr. Groebe which follows on page 40, and which includes the following question and answer:

"201 XQ. And you are fairly confident that the prices for export purposes to every other purchaser from Barrett were higher than the price to the British?

"A. My recollection is that they were higher."

Mr. Albert Henry Snow, formerly supply officer of the British Purchasing Commission, a witness for the petitioner, testified as follows (Swiss R. 35):

"100 XQ. But, as the Commissioner has amended my question, you now agree with me that if they (purchasers other than the British) could buy it, they had to buy it at a different price than what the British were paying for it?

"A. Yes."

There is no testimony to the contrary with respect to the special status of the British purchases and respondents respectfully submit that these sales provide no criterion whatsoever with regard to the problem involved in these cases.

Consequently, the refusal of the Court of Claims to adopt the prices involved in the British sales is entirely understandable, and is not, as claimed by the petitioner on page 22 of its Petition, "so far inconsistent with the facts of record." Rather, the petition for *certiorari* is completely silent as to these facts of record.

Turning now to petitioner's second point, it is clear from the record that there was a difference between the domestic and the export market value, as the Court of Claims plainly found. (See, e.g. testimony of the witness Schwartz, Swiss R. 31-33).

And, we submit, the requisition in this instance *legally* characterizes the toluol as *export* merchandise. In other words, Section 1 of the Act of October 10, 1940,[2] authorizes the requisition only of property which was "ordered, manufactured, procured or possessed for export purposes." The seizure of the property, therefore, precludes the United States Government from claiming at this point that the property does not have all the attributes of export toluol, including the export price.

In an effort to make its second point, petitioner uses such phrases as "not intended for sale in export trade", "price paid in a unique sale", and "the only outlet for toluol prevailing in November, 1941, was the domestic market."

These phrases are either inapplicable, inaccurate or immaterial.

We are concerned with the value in November, 1941. A sale of 300,000 gallons had been made to the Swiss Government in June 1941 at the export bulk price of 34 cents a gallon. Sales were made to the Russians in August and October of that year at 35 cents. (Swiss R. 30-31.) There was no evidence of export sales during that period at any lower prices.[3] There was nothing unique about these sales. And, as the Court of Claims said in its opinion (Swiss R. 13), it is reasonable to assume that the respondents could have disposed of their toluol to the Russians at an export price of 35 cents if it had not been requisitioned, and thus there was an outlet other than the domestic market.

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[2] Quoted in the Appendix to the Petition for certiorari.

[3] The British sales are not important, as hereinbefore demonstrated.

Moreover, evidence regarding these actual sales was bolstered by the opinion of the witness Schwartz, clearly an expert, that in November, 1941, 35 cents constituted the fair export market price for bulk toluol. (Swiss R. 35.)

In this connection, this Court has said in *United States* v. *Miller*, 317 U. S. 369, 63 S. Ct. 276, 87 L. Ed. 336:

> "Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in significant amounts, the application of this concept involves, at best a guess by informed persons."

It seems clear to respondents that the *New River* case, *supra*, was not misapplied by the lower court, nor extended beyond the obvious spirit of the rule therein stated. Time and again this and other courts have held, in effect, that the owner of condemned property is entitled to be compensated for the highest and most profitable use for which the property is likely to be needed in the reasonably near future. See, e.g., *Olson* v. *United States*, 292 U. S. 246, 78 L. Ed. 1236, 54 S. Ct. 704. Such was plainly the objective of this Court in the *New River* case when it said:

> "Nor was it error to exclude evidence of the market prices of coal for domestic use, and to hold that market prices for export coal controlled. The owner cannot be required to suffer pecuniary loss. Upon an examination of the record we agree with the statement of the circuit court of appeals (276 Fed. 690, 691) that, if the coal had not been taken by the United States, it would have been sold at the market price for export coal prevailing for spot deliveries at the time of the taking."

Petitioner interprets the *New River* case as requiring a flourishing export market. Such may have been the fact in that case, but surely that is not an absolute condition to the application of the benevolent doctrine laid down therein. While petitioner emphasizes the diminution of the export trade, it cannot successfully maintain that it was completely

eliminated. As stated by the lower court and referred to above, the Russians were still potential purchasers of the toluol in November, 1941, and undoubtedly they would have paid respondents 35 cents a gallon for it if respondents had been willing to sell to them.

In any event, petitioner's position is much too narrow. It is undisputed that the toluol was purchased for export, that export prices were paid for it and that it would have been exported but for the inability to obtain the necessary licenses. Moreover, as stated above, the toluol could not have been requisitioned but for its export status. Unlike the coal in the *New River* case, it was not being offered for sale, and there was no need to inquire as to whether it would have gone into the domestic or foreign market. It had been sold, and sold only for export.

The existence of a market is one way of ascertaining a price. There are other methods, as this Court indicated in the *New River* case. Petitioner does not question that export sales in the *second half* of 1941 had been at 34 and 35 cents, nor does it assail the expert opinion of Mr. Schwartz. Stated differently, petitioner does not say at this point that 35 cents is excessive as an export price; it merely says that at the time of requisition, there was virtually no foreign trade in the commodity, and therefore the domestic price must prevail.

Petitioner's contention, we submit, is neither sound nor right, and should not overshadow the obligation of the United States to pay *fair* and *just* compensation for the taking.

On pages 19 and 20 of its Petition, the United States invokes the long-established "sovereign-act" doctrine, claiming in effect that the allowance of the export price instead of the domestic price in this case constitutes compensation for damages suffered by reason of the export-control regulations and navicert system. The lower court recognized this doctrine in its opinion (Swiss R. 13), and scrupulously avoided any conflict with it.

This doctrine has utterly no application to the present situation. Here, one sovereign act prevented exportation, and another one, namely, requisition, seized the property. It is true that respondents are claiming damages, but this is just compensation for the requisition, and none for the governmental act preventing exportation. It is the petitioner which seeks to profit from the governmental acts;—the respondents do not claim damages as the result thereof. In other words, petitioner says that it and the British prevented exportation, and therefore wiped out the export market, and need only pay the domestic price. Respondents reply that they are not claiming the export price as a consequence of the governmental acts of export control and blockade, but because this was the price applicable to their toluol despite such acts.

Twice, petitioner refers to a valution of 28½ cents per gallon being given in connection with the quantity of toluol which the Swiss Government was permitted to export on December 14, 1941.[4] However, reference back to the Swiss Record, page 5, shows that apparently a shipping concern put this valuation in the Export Declaration. Surely, this valuation constitutes evidence of nothing, and can have no effect upon respondents' positions. There can be no doubt that this quantity of toluol, being actually exported, was worth more than the domestic price of 28½ cents, and, even more importantly, if the Export Declaration had been made out by one familiar with the actual facts, a valuation of not less than 34 cents would have been inserted, since the same toluol had been purchased at that price several months earlier (Swiss R. 4).

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[4] This appears near the bottom of page 7 of the Petition for certiorari, at which point petitioner says that respondent's "agent" so declared, and again in footnote 5 on page 22, where it is alleged that the respondent itself so declared.

CONCLUSION.

The decisions below are clearly correct, there is no conflict with the *New River* case, and the questions do not warrant further review. The petition for writs of certiorari should therefore be denied.

Respectfully submitted,

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October, 1947.